United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1077

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 74-1077

CAPITAL TEMPORARIES, INC. OF HARTFORD
CAPITAL TEMPORARIES, INC. OF NEW HAVEN
and
CONSTANTINE T. ZESSOS,
Plaintiffs and Appellants

v.

THE OLSTEN CORPORATION
Defendant and Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE DEFENDANT-APPELLEE

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COUNTERSTATEMENT OF THE ISSUES

In accordance with Rule 28(b), Fed. R. App. P., Appellee makes the following counterstatement of issues:

I. Was an illegal tie-in arrangement effectuated by the language of the agreement?

II. Does evidence *dehors* the contract establish an illegal tie-in arrangement?

III. Assuming, *arguendo*, that the economic power required to establish an illegal tie-in arrangement exists, can there be an illegal tie-in without a concomitant misuse of that economic power?

IV. Did the District Court err in granting Summary Judgment?

STATEMENT OF THE CASE

This case is before this Court on an appeal, permission for which was granted under the provisions of 28 U.S.C. § 1292(b), from a summary judgment in the United States District Court dismissing the Fifth Count of Plaintiffs' Amended Complaint.

The Fifth Count alleged a "tie-in" violation of the anti-trust laws. The operative paragraph of the Count is:

> 34. In order to obtain an exclusive license to use said trade name and mark, and to operate a "white collar" franchise thereunder (the tying product), the plaintiff Zessos was required to establish and operate a separate operation to handle the supplying of "blue collar" personnel under the trade name and trade mark of "Handy Andy Labor." (The tied product) (A. 14-15)

The Plaintiffs-Appellants, Capital Temporaries, Inc. of Hartford, Capital Temporaries, Inc. of New Haven and Constantine T. Zessos (hereinafter sometimes referred to as "Zessos")[1] originally brought this action against the Defendant-Appellee, The Olsten Corporation (hereinafter sometimes referred to as "Olsten"), certain of the Defendant's local counsel and various officers of the State of Connecticut, including the High Sheriff, by a complaint filed on November 24, 1971. The original complaint claimed a Three Judge District Court and sought an invalidation of the Connecticut prejudgment attachment laws. The complaint was in response to Olsten's suit against Zessos in the Connecticut Superior Court in Hartford County. (A. 79, Par. 44)

Thereafter, Olsten, by Complaint dated November 30, 1971, brought suit against Capital and Zessos in the United

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[1] Where it is significant to make a distinction between the corporate plaintiffs and the individual plaintiff, the corporate plaintiffs will be referred to as "Capital" and the individual plaintiff as "Zessos" either to delineate the plaintiffs as a group or Zessos alone, as will be obvious from the context.

States District Court to enjoin them from "palming off" their services as being those of Olsten. (A.320-336) The preliminary injunction issued as requested on December 7, 1971. (A.80, Par. 48)

After the issuance of the District Court's injunction, Zessos amended its complaint on January 26, 1972, to allege, for the first time, *inter alia*, violations of the anti-trust laws. (A.8-44) That Amended Complaint has formed the basis of all subsequent proceedings.

On April 30, 1973, Olsten filed its Motion for Summary Judgment as to the Fifth Count of plaintiff's Amended Complaint. (A.71)

On May 23, 1973, Zessos and Capital filed their Motion for Partial Summary Judgment on the Fifth Count. (A.305)

On June 25, 1973, the District Court heard the parties' cross-motions for summary judgment as to the Fifth Count of the Amended Complaint, and, by decision dated October 10, 1973, denied Zessos' motion and granted Olsten's motion. (A.358-373)

On October 15, 1973, Partial Summary Judgment in favor of Olsten was entered. (A.374) Thereafter, on October 25, 1973, Zessos moved to alter or amend the judgment to include a statement pursuant to 28 U.S.C. § 1292(b) that such partial summary judgment involved a controlling question of law as to which there was substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. (A.375)

Zessos' motion did not state the controlling question of law as to which there was substantial ground for difference of opinion, but, over opposition by Olsten, the District Court on December 4, 1973, amended the partial summary judgment to include the requisite statement necessary to petition this Court pursuant to 28 U.S.C. § 1292(b). (A.376-77) The

District Court's Memorandum did not state the controlling question of law. (A. 376-77)

Thereafter, under date of December 21, 1973, Zessos filed a Petition for Permission to Appeal which, for the first time, contained a statement of controlling question of law to be determined by this Court. It was as follows:

> The question involved in this appeal is whether the plaintiff must establish actual coercion, outside of the agreement, to operate the tied business, in order to maintain its antitrust action, or is it sufficient to show that the plaintiffs were restricted by the contract imposed by the defendant from operating any blue collar business other than under the HANDY ANDY mark with a payment of franchise fees to the defendant.

On January 9, 1974, this Court granted Zessos leave to appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5, Fed. R. App. P.[2]

On March 22, 1974, Zessos filed with this Court, pursuant to Rule 30, Fed. R. App. P., a Designation of Parts of Record Intended to be Included in the Appendix, including the following statement of issue:

> The issue which the plaintiffs intend to present for review is whether or not the District Court erred in granting the defendant's Motion for Summary Judgment on the Fifth Count.

On or about April 3, 1974, Olsten filed with this Court a Motion for Order to conform the Statement of Issue to the Mandate of this Court. On or about April 18, 1974, this Court granted Olsten's motion and limited the statement of issue

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[2] The attention of the Court is called to the fact that Olsten filed a Motion to Dismiss the Petition for Permission to Appeal on the ground that it was not timely filed in relation to the District Court's original Supplemental Memorandum and Order, dated December 4, 1973.

to the statement of controlling question of law presented in Zessos' Petition for Permission to Appeal.

The issues, as stated in Zessos' brief to the Court, are broader in scope than the limitations set forth in this Court's Order of April 18, 1974. A Motion to Dismiss or for Other Relief based on that fact has been reserved for decision by this Court.

STATEMENT OF FACTS

In support of its Motion for Summary Judgment, Olsten relied not only on affidavits filed therewith but also on contemporaneous documents prepared by, for or transmitted to, Zessos in 1968 and 1969 and on a deposition of Zessos taken on December 26, 1972 (A.93) and December 27, 1972. (A.233) Zessos' supporting affidavit for his Motion for Summary Judgment was prepared and served some three weeks after Olsten's Motion for Summary Judgment.

Olsten is engaged in the business of supplying temporary personnel to customers. It supplies both "white collar" (office personnel) under its name and trademark of "Olsten" and "blue-collar" (non-office employees) under the name and trade mark of "Handy Andy". The services are supplied in the various cities in which there are Olsten operations, either through branch offices of Olsten or through franchisees licensed by Olsten. Most of the Olsten franchisees operate only Olsten, or white collar, operations. Some of the franchisees operate only Handy Andy, or blue collar, operations. Some of the franchisees operate both types of operations. There is no requirement that any franchisee operate both. (A.72-77)

In 1965, Zessos, having become aware of the Olsten franchise possibilities, entered into negotiations with Olsten for a franchise. The negotiations covered at least six to eight meetings. (A.108-109) The negotiations resulted in the original franchise agreement, dated September 17, 1965, to operate an Olsten, or white collar, franchise in the counties of Hartford and Middlesex in the State of Connecticut. (A.19)

A rider between the parties executed on the same date granted as part of the license the "right" of the licensee (Zessos) to operate a white collar franchise in the County of New Haven. (A.35)

In the negotiation of the contract, the franchise fee was apparently initially to be $10,000, but, during the course

of the negotiations between Olsten and Zessos, the franchise fee ultimately agreed on and incorporated in the agreement of September 17, 1965, was bargained down to $6,000. (A.108-109) This franchise fee was to be paid over a period of time in four installments, only three of which were paid. (A.75-76) The final installment has not only not been paid, but Zessos has refused to pay it. (A.76)

The contract provided only for a "right", rather than an obligation, of the licensee to operate a white collar franchise in the County of New Haven. That option was on the condition that an Olsten, or white collar, office be opened and in operation there within eighteen months after the first billing rendered by the white collar franchise in Hartford. The failure to open an office within that period of time would terminate the licensee's right to operate a white collar office in New Haven, and he would receive a credit of $2,500 towards the total license or franchise fee of $6,000 upon such failure to exercise his right or option. (A.35) Thus, in effect, the $6,000 franchise fee was allocated as being $3,500 for a Hartford white collar franchise and $2,500 for a New Haven white collar franchise. (A.75-76, Par. 22-23; A.35, Par. 35)

Paragraph 2 of the September 17, 1965, agreement between the parties also granted the licensee the "right" "to use the trade mark and name Handy Andy Labor" for a blue collar operation. (365 F.Supp. at 890)

That paragraph of the agreement then went on to describe the mechanics of how the licensee was to operate if he exercised his right to operate a blue collar personnel office in view of the obvious fact that white and blue collar employment services were separate businesses operating in completely different customer markets. (365 F.Supp. at 893)

There is no evidence that Zessos ever bargained with Olsten for a white collar franchise alone. "Rather, the conclusion is unavoidable that, throughout the history of his relationship with the defendant, the plaintiff considered the

blue-collar business 'just another area that we could earn quite a bit of income, an area that the Olsten organization was expanding into'." (365 F.Supp. at 895)

Zessos started his Hartford white collar operation in January, 1966, and opened his New Haven white collar operation within eighteen months thereafter. (A.110-111)

Paragraph 2 of the franchise agreement provided that the blue collar franchise, if the right to use it were exercised, should not commence operations before six months from the date of the agreement. It did not require that such franchise operation *had* to be commenced thereafter. (365 F.Supp. at 894-5). Zessos made no move to exercise his right to open a blue collar office until some four years after the execution of the franchise agreement.

However, in May of 1968, some two and one-half years after entering into the franchise agreement, Zessos received an opinion from counsel, whom he had consulted, to the effect that Handy Andy Labor should have commenced in March of 1966. (A.83) Faced with this opinion that he apparently had an "obligation" rather than merely a right to open a Handy Andy office, Zessos still did nothing whatsoever to attempt "to free himself from the supposed burden of having to open a Handy Andy office". (365 F.Supp. at 894)[3]

He not only did not make any attempt to relieve himself of the burden of a Handy Andy office, but took active steps to preserve his right to open a blue collar operation. In the course of the negotiations that commenced in 1968 and culminated in an amendment to the franchise agreement in August, 1969, Zessos specifically took action to preserve his rights to open a Handy Andy and volunteered to include in that agreement a December 31, 1969, time limit within which to

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[3]For reasons unknown, Zessos testified during his deposition that he had not at any time prior to September, 1969, ever discussed with counsel the time requirement for opening a "blue collar franchise". (A.200-201)

open a Handy Andy. (365 F.Supp. at 894; A.43-44; A.83-87) He had in February, 1969, organized a corporation to open a Handy Andy operation and decided, in the spring of 1969, to open in New Haven rather than Hartford, with a decision to be made after his New Haven experience as to whether he would exercise his right elsewhere. (A.279-283) The December 31, 1969, date had no significance to him, since he had, prior to signing the contract amendment, actually decided to open in New Haven in September of 1969, which is when and where he did open a Handy Andy office.

Between September 17, 1965, and November 1, 1971, Zessos, operating, apparently successfully, as a white collar franchisee of Olsten, accrued franchise fees in the approximate amount of $37,000, which are still due and owing to Olsten. (A.78, Par. 40)

On or about November 1, 1971, Zessos repudiated the franchise agreements, changed the names of the franchisee corporations, and, as an independent entrepreneur, continued to conduct the same business as Zessos had conducted as a franchisee, at the same locations, with the same administrative personnel, with the same inventory of temporary employees, with the same customers, and with the same advertised and listed telephone numbers. Zessos took these actions without prior notice either to The Olsten Corporation or to William Olsten, who was chairman of the board and chief executive officer of the franchisor corporation and a member of the boards of directors of the Zessos corporations, and in derogation of the express terms of the franchise agreement. (A.79, Par. 41-43)

Thereafter, Olsten brought suit against Zessos in the Connecticut Superior Court to enforce the franchise contract and to recover the monies then due and owing to Olsten thereunder. (A.79, Par. 44) The pleadings in the State court action are closed, and the case is presently on the trial list.

Zessos later commenced the present suit and, after Olsten obtained an injunction against Capital and Zessos for "palming-off" their services as being those of Olsten, Capital and Zessos amended their complaint to allege, for the first time, violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. (A.14-16, Par. 32-42; A.80, Par. 46-49)

The District Court stated the issue to be:

> Zessos claims that under the contract he was compelled to open a blue-collar Handy Andy employment service in order to receive the Olsten's white-collar franchise he desired. He asserts that Olsten, in yoking the two operations and refusing him the choice of taking the one he wanted by itself, enforced a tying arrangement (tie-in) unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1. The defendant denies that either its conduct or the contract itself obligated or compelled Zessos to operate a Handy Andy. In other words, Olsten argues that while Zessos was afforded the opportunity to operate the blue-collar agency if he chose to do so, he was *required* only to run the Olsten's office and pay the franchise fee. (365 F.Supp. at 891) (Footnotes omitted).

In resolution of that issue, the District Court stated:

> . . . "The record is utterly devoid of evidence that Zessos was in any way coerced or compelled to open a Handy Andy office. To state the crucial point another way, there is no indication whatever that Zessos attempted to free himself from the supposed burden of having to open a Handy Andy office, or that he bargained with Olsten for a white-collar franchise alone." 356 F.Supp at 894.
>
> "I conclude from the evidence presented by both parties in the form of affidavits and depositions that it is beyond factual dispute that the defendant never

exerted any economic pressure to compel the plaintiff to operate a blue-collar employment service franchise. I find, to the contrary, that the only dealings between the parties on the subject of Handy Andy came at the behest of the plaintiff, who sought an extension of time in which to begin such operations." *Id.* at 894-95.

"I find, therefore, that the white-collar and blue-collar franchises were entirely separate operations; that the plaintiff was never compelled to operate the latter in order to obtain the former; that he received the right to use the Handy Andy trademark along with his purchase of the Olsten franchise without payment of additional consideration." *Id.* at 895-96.

"Construing as a matter of law the plain language of the contract . . . I hold that Zessos was in no way obligated to enter the blue-collar industry and that his only obligation under the contract was to fulfill its conditions with respect to the Olsten white-collar franchise." *Id.* at 896.

It should be noted that nowhere in the supporting material for Zessos' motion for summary judgment does it appear, even by implication, that Zessos at any time either made an attempt, or had any interest in making an attempt, to open a blue collar operation of his own and not as a franchisee or to seek a blue collar franchise from some other franchise operation, or that he was even approached by any blue collar franchise organization for an expression of interest in acquiring a franchise for a blue collar operation.

ARGUMENT

I.

INTRODUCTION

The agreement between the parties, as in many, if not most, franchise agreements, provides for two kinds of payments to the franchisor. First, there is a license fee, which is sometimes referred to as a franchise fee or initial license or franchise fee, paid by the licensee to the licensor upon the signing of the agreement. (A.20, Par. 3) In addition, and apart from the license charge, most franchise agreements provide for the payment by the licensee of franchise fees computed at a percentage of gross or net billings once the franchisee is in operation. (A.21, Par. 4)

A major element of confusion throughout Zessos' brief arises from using the term "franchise fee", to apply interchangeably and inconsistently to the initial and the percentage franchise fees.

Zessos' brief also has a variety of positions with regard to what constituted the tie-in.

1. The basic position originally taken by Zessos was that he was required to agree to establish and operate a blue collar operation in order to obtain a license to operate a white collar franchise.

2. Subsequently, as a result of his misreading of the negotiations leading up to the August, 1969, amendment to the franchise agreement, Zessos takes the position that he was required to open and operate a blue collar franchise by the limitation date put in the August, 1969, agreement by Zessos' own initiative. This is claimed as being somehow a statement of a compulsion, which Zessos had not recognized as existing prior to that time, rather than merely a new option date.

3. Zessos also takes the position that a tie-in agreement exists, not because there was any requirement for opening or operating the blue collar franchise, but that it exists because Zessos is foreclosed from operating a blue collar franchise as a principal or as a franchisee of some other franchise organization, even though the franchise agreement says nothing about any restriction on Zessos from entry into the blue collar personnel business not as an Olsten franchisee.

4. Finally, Zessos also takes the position that there is a tie-in because other blue collar franchisors cannot seek him out as a franchisee for a blue collar operation, even though the franchise agreement says nothing about Zessos' right to enter into a blue collar operation under other auspices.

With regard to the latter two positions, Zessos shifts away from paragraph 2 of the franchise agreement to paragraphs 25 and 26 of the franchise agreement. (A.31)

Paragraph 25 is a best efforts clause, which calls for Zessos to refrain from engaging in activities competing with the operation of the temporary *office* personnel business. Since the franchise agreement permits Zessos to operate as a blue collar franchisee, obviously operating a blue collar temporary personnel business does not conflict with the best efforts requirements.

Zessos also relies on the restrictive covenant in paragraph 26, which is wholly inapplicable, since it applies to the situation that comes into being when he has terminated the franchise agreement.

II.

SUMMARY OF ARGUMENT

The Court below understood very clearly what the issues are in this case and how they were to be determined. In the process of examining the decision, it becomes quite clear

that there is no controlling question of law about which there is a substantial difference of opinion.

Fortner Enterprises v. *U. S. Steel Corp.*, 394 U.S. 495 (1969), and the cases that follow therefrom, may have relaxed the burden upon a plaintiff in a tie-in anti-trust case of proving the existence of economic power in the seller.

However, as this Court recognized in the case of *American Manufacturers Mut. Ins. Co.* v. *B.-P Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972), economic power must not simply exist, it must be used, to establish an illegal tie-in. In other words, there must be the exercise of some economic muscle to provide an illegal tie-in.

The issue in this case, assuming, *arguendo*, that the economic power exists, is whether any economic power was exercised to create an illegal tie-in. Under *American Manufacturers*, economic power must be used before an illegal tie-in can be established.

Thus, as the Court points out (365 F.Supp. at 894), there is no evidence in the record that Zessos was coerced or compelled or imposed upon to open a Handy Andy office, but rather that he had an option which he could exercise, or not, as he chose, with no restraint requiring him to do so. There is no indication that Zessos sought, or bargained with Olsten for, a white collar franchise alone or ever supposed himself burdened with a requirement to open a Handy Andy office.

Zessos' statement of the issues "sidesteps" the key questions in this case.

As to his statement of issue I, there are no questions of motive or intent or determination of the state of mind of any of the parties. There is no question of ambiguity under circumstances where the actions of the parties taken under their interpretation of the meaning of the contract coincide with the clear meaning of the contract language.

The question is thus one of interpreting a contract as a matter of law.

With regard to issue II, Zessos ignores the fact that, under paragraph 2 of the franchise agreement, what Zessos obtained from Olsten was a *right* or *option* to open a blue collar franchise, not an *obligation* to do so. (A.20) Similarly, he obtained by the rider to the agreement a "right" to operate a white collar franchise in New Haven County. Each such right was subject to the condition that if, as, and when such right were exercised, a matter completely within Zessos' own control, Zessos would then have to operate the business (white or blue collar) in accordance with the franchise agreement. Absent exercise of such right, the agreement does not curtail Zessos' activities in the blue collar business under other auspices.

Zessos' statement of issue III says the same thing in two different ways. The issue is whether there has been an exercise of economic power to achieve a tie-in, whether by contract or otherwise. The Court below has found that there has been no such exercise of economic power imposing a tying arrangement, no unlawful coercion, and no compulsion.

III.

THE FRANCHISE AGREEMENT DOES NOT CONSTITUTE AN UNLAWFUL TYING ARRANGEMENT.

Olsten respectfully submits that the determination of whether a tying arrangement existed between its "white collar" and "blue collar" services disposes of all issues raised by this appeal. Absent this tie-in, all other arguments advanced by Zessos are superfluous.[4]

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[4] This appeal is before the Court, at its discretion, based on 28 U.S.C. § 1292(b) which mandatorily limits the issue on appeal to "a controlling question of law as to which there is substantial difference of opinion". Zessos has repeatedly, throughout the course of this appeal, ignored this injunction. Zessos' Petition for Per

Paragraph 34 of the Fifth Count of Zessos' Amended Complaint (A.14-15) alleges:

> In order to obtain an exclusive license to use said trade name and mark, and to operate a "white collar" franchise thereunder (the tying product), the plaintiff Zessos was required to establish and operate a separate operation to handle the supplying of "blue collar" personnel under the trade name and trade mark "Handy Andy Labor". (The tied product)

Zessos' Amended Complaint is based on the License Agreement (A.19-34) and the Rider thereto (A.35-36), both dated September 17, 1965.

By the terms of the License Agreement, Zessos was granted a license to:

> [U]se the trade name and trade mark OLSTEN'S, the various techniques and systems in the area above described (the Counties of Hartford and Middlesex) so long as the LICENSEE observes and performs all of the terms, covenants and conditions of this agreement . . . (A.20, Par. 1) (*parenthetical material added*)
>
> The grant of the license hereunder includes the *right* of the LICENSEE to use the trade mark and name

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mission to Appeal, granted by this Court, states the controlling question of law:

> The question involved in this appeal is whether the plaintiffs must establish actual coercion, outside of the agreement, to operate the tied business, in order to maintain its antitrust action, or is it sufficient to show that the plaintiffs were restricted by the contract imposed by the defendant in operating any blue collar business other than under the HANDY ANDY mark with the payment of franchise fees to the defendant.

After Zessos attempted to change and broaden this issue in its Designation of Parts of Record, Olsten moved for, and was granted by this Court, an Order limiting the statement of issue. Once again, Zessos is attempting to broaden the issue on appeal by introducing extraneous issues in his Brief on appeal, most notably by suggesting that this Court review the District Court's conclusion that there is no genuine issue of material fact, an objective which is clearly beyond the permissible bounds of a § 1292(b) appeal.

> HANDY ANDY LABOR. All "blue collar" personnel shall be supplied by a division of the LICENSEE designated as HANDY ANDY LABOR commencing six (6) months from the date hereof . . .
>
> The division shall be known as HANDY ANDY LABOR, a division of OLSTEN'S OF GREATER HARTFORD, INC. At the option of the LICENSEE, such division may be operated as a separate corporate entity. In such event, it shall be designated as HANDY ANDY LABOR OF GREATER HARTFORD, INC. . . . (*emphasis added*) (A.20, Par. 2)

Although Zessos and his legal counsel have read into the contract a requirement that the blue collar franchise open within six months from the date of the contract, that is not what the plain language of the contract provides.

As the District Court concluded, paragraph 2 of the franchise agreement, rather than establishing a mandatory time limit within which the blue collar franchise must be opened, establishes a mandatory time limit prior to which Zessos could not open a blue collar franchise. 365 F.Supp at 895.

After entering into the franchise agreement, the parties, on the same day, entered into a rider thereto. (A.35-36) The rider provided in pertinent part:

> The grant of the license hereunder includes the *right of the LICENSEE* to operate in the County of New Haven, in the State of Connecticut. This is predicated upon the condition that an OLSTEN'S office be opened and in operation within eighteen (18) months after the first billing rendered by the OLSTEN'S Hartford office. In the event the LICENSEE fails to open an office in the County of New Haven within the prescribed period of time, the LICENSEE shall *forfeit the right to operate* in

> the County of New Haven under an OLSTEN'S franchise and shall receive a credit of $2,500.00 towards the total license charge of $6,000.00 upon such forfeiture. (A.35, Par. 35) (*emphasis added*)

Thus, the original franchise agreement granted Zessos certain franchise rights in Hartford and Middlesex counties. These franchise rights included the white collar franchise and also the right to use the trademark and trade name "Handy Andy Labor" in the counties of Hartford and Middlesex only.

The rider granted the "right of the LICENSEE to operate in the County of New Haven". This right was based on the condition "that an OLSTEN'S office be opened and in operation within eighteen (18) months after the first billing rendered by the OLSTEN'S Hartford office". The rider further provided that in the event that Zessos failed to open an Olsten, or white collar, New Haven office within the eighteen month period, he would "forfeit the right to operate in the County of New Haven under an OLSTEN'S franchise and shall receive a credit of $2,500.00 towards the total license charge of $6,000.00 upon such forfeiture". (A.35, Par. 35)

However, the rider does not mention the licensee's *right* to open a Handy Andy office in New Haven, much less *require* the licensee to open a Handy Andy office in New Haven.

Neither the franchise agreement nor the rider provide for a tying of the blue collar franchise to the white collar franchise. Furthermore, there is no reasonable construction of either document which could infer such a tying requirement. There is a significant distinction between Zessos having a *right* to open a Handy Andy as set forth in the original franchise agreement and Zessos having an affirmative *duty* to open a Handy Andy.

Zessos testified during his deposition that he had not discussed the time requirement for opening the "blue collar" franchise with any attorney. (A.200-202) However, the record is clear that not only did Zessos discuss this matter with his attorney, but that Zessos proposed the time limitation set forth in Paragraph 2 of the August, 1969, amendment on his attorney's advice. (A.83-85)

The amendment (A.43-44), dated August 23, 1969, specifically requested by Zessos (A.86; 365 F.Supp. at 894), provided, in pertinent part:

> The LICENSEE'S time to open HANDY-ANDY offices in Hartford and New Haven is extended to December 31, 1969. (A.43, Par. 2)

This time limitation, included in the amendment at Zessos' insistence (A.78, Par. 35), cannot transform a lawful agreement into an unlawful agreement.[5] In the first place, the time extension cannot, in retrospect, be regarded as a tying arrangement, since it was insisted upon by the franchisee and not by the franchisor.

Zessos' handwritten notes indicate that he had neither an affirmative nor a negative obligation to open a blue collar franchise. (A.86-87) Those notes clearly indicate the speciousness of Zessos' claimed tying arrangement. Zessos himself admits that "Bill & I have gentlemen's agreement - no fee - no time limit".[6] This was no more than a statement of what Zessos understood the franchise agreement to mean from the outset; indeed, Zessos' own conduct consistently belies his now claimed interpretation of the agreements between the parties as tying the white and blue collar franchises.

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[5]The District Court stated:

A reasonable time limitation on an opportunity previously extended cannot be translated into an exercise of economic power; there is no requirement that an offer remain open perpetually under peril of the antitrust laws. 365 F.Supp. at 894.

[6]See 365 F.Supp. at 894n.12.

This critical admission is dispositive of the Fifth Count.

In May of 1968, Zessos' attorney, John Poulos, wrote to Zessos that:

> Handy Andy labor should have commenced in March of 1966. You should extend the date or have it eliminated. The agreement should also provide that no *additional license fee* is to be charged for Handy Andy. (A.83) (*emphasis added*)

Zessos' reaction to his attorney's advice indicates that Zessos, at least in 1968, understood his franchise agreement and knew that there was no initial license fee for Handy Andy and that there was no time limit within which he had to open the Handy Andy to preserve his right to such franchise.

Furthermore, paragraph 2 of Zessos' notes (A.86) indicates that the only reason that Zessos ultimately requested the time limitation, which became paragraph 2 of the August, 1969, amendment, was because Olsten was "going public":

> 2. Handy Andy. Bill & I have gentlemen's agreement-no fee-no time limit.[7]
>
> However, now that we're going public, please put it into contract. I'm certainly going to open another Olsten office everywhere I can. - *Open Handy Andy & these offices at my option* - Dec. 31, 1969. (A.86, Par. 2) (*emphasis added*)

Thus, it was clearly understood and intended by all parties that Zessos had: (1) the *duty* to open a white collar franchise in Hartford; (2) the right to open a white collar franchise in New Haven; (3) the *right* to open a blue collar

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[7] It is clear that Zessos' use of the term "no fee" is no more than a cryptic reference to the original license charge because Olsten's franchise fees did not accrue until Zessos began Handy Andy billing, and billings could not have occurred prior to the opening of a blue collar office.

franchise; and (4) the restriction that, if he failed to open the blue collar franchise, he would lose the right to open that particular franchise.

There are no allegations nor testimony nor documentary evidence suggesting that Zessos would have lost the right to operate a white collar franchise upon his failure to open a blue collar franchise. The contract, documentary evidence and testimony of Zessos all indicate that Zessos was given the *right* or *privilege* of opening a blue collar franchise. (A.355, Par. 4; A.357, Par. 4; A.76, Par. 26; 365 F.Supp. at 894-5) The only possible sanction which could be imposed on Zessos was that, if he elected not to open a blue collar franchise, he would lose the privilege of operating the blue collar franchise. Zessos set a definite time limitation on such right, but that limitation did not in any way affect Zessos' rights under the franchise agreement other than to set a time limit on the exercise of an option as to the blue collar franchise only.

IV.

OLSTEN'S CONDUCT DOES NOT ESTABLISH AN UNLAWFUL TYING ARRANGEMENT.

A. There Was No Tie-In Between The Franchise Fee Paid for "White Collar" and "Blue Collar" Franchise Rights.

Zessos bargained for and obtained a territorial franchise including Hartford, Middlesex and New Haven counties. The respective franchise territories are set forth in the original franchise agreement (A.19-34) and the rider thereto. (A.35-36)

Although the original agreement and rider do not so provide, Zessos, after repudiation of the agreements, has taken the position that the $6,000 franchise fee referred to in those

two documents included an illegal tie-in between the white collar and the blue collar franchise fee.

Although Zessos does not know the component parts of the claimed allocation comprising this alleged tying arrangement (A.268-69), he now claims that the existence of such "allocation" constitutes an unlawful tying arrangement.[8]

This argument finds no support either in the parties' contracts or Zessos' conduct. The original franchise agreement, which granted to Zessos the Hartford and Middlesex franchise territories, also included the "right of the LICENSEE to use the trade mark and name HANDY ANDY LABOR . . ." (A.20, Par. 2) If the right were to be exercised, it was specifically provided that the blue collar office was to be know as "HANDY ANDY LABOR, a division of OLSTEN'S OF GREATER HARTFORD, INC.". *Ibid.*

The original franchise agreement does not grant the licensee the right to open a Handy Andy office in New Haven. On the contrary, it grants the licensee franchise rights in Hartford and Middlesex counties only. (A.19) Similarly, the rider grants the "right of the LICENSEE to operate in the County of New Haven . . .". However, the rider does not even mention the licensee's right to open a Handy Andy office in New Haven, much less require the licensee to open a Handy Andy office in New Haven. (365 F.Supp. at 891, 895)

Thus, the thrust of Zessos' claims of a tying arrangement must be that the $3,500 franchise fee paid for the rights to Hartford and Middlesex counties ($6,000 total franchise fee minus $2,500 specifically attributed to New Haven County) is somehow allocated between the white collar operation in Hartford and the blue collar operation in New Haven.

There is no support, documentary or otherwise, for this claim. Even if the original franchise agreement and rider were

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[8] Zessos has not even fully paid this franchise fee. (A. 109)

to be read as an integrated contract, it is clear that the rider is at most a territorial extension of the rights and obligations set forth in the original franchise agreement.

There is no language in either contract to support Zessos' claim that there is a reverse integration from the rider to the original agreement, so that the $3,500 paid for franchise rights in Hartford and Middlesex counties also included an undetermined amount for blue collar operations in New Haven County.

Zessos has no knowledge of what portion of the $2,500 franchise fee, if any, for rights in New Haven County was attributable to white collar operations and what portion of the fee was attributable to blue collar operations. (A.268-269) Since Zessos was negotiating for both a white collar and a blue collar franchise, it would seem, at the very least, that he would know the *quid pro quo* for each facet of his purchase. The negotiations were not perfunctory. Zessos even had the bargaining power to achieve a substantial reduction in the initial franchise fee.

Moreover, the documentary evidence submitted by Olsten has established that there was no allocation between the white collar and the blue collar operation because Zessos did not pay any franchise fee for the right to open a blue collar operation. Olsten has submitted sworn testimony, uncontradicted by Zessos, that the $6,000 franchise fee was attributable solely to the white collar operations. (A.76-77)

Zessos is thus in the untenable position of attempting to convert that which was offered to, and accepted by, him nine years ago into an illegal tying arrangement.

Having no rebuttal to the facts, Zessos has attempted to fit the facts at bar within the scope of *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962). (Zessos' Brief, p. 31) However, *Loew's* is inapposite. Accepting the facts in the light most favorable to Zessos and assuming, *arguendo*, the contractual

imposition of an illegal tying arrangement,[9] Zessos recognized that that agreement was rendered nugatory by the "gentlemen's agreement" (i.e. "no fee - no time limit") between Olsten and Zessos. (A.86) Therefore, it was not until the imposition of the time limitation by means of the August, 1969, amendment (A.43-44) that the claimed "illegal" tie-in could have first come into existence. However, the August, 1969, amendment cannot impose anti-trust liability upon Olsten since that amendment was proposed, and insisted on, by Zessos (A.86, Par. 2; 365 F.Supp. at 895), and it added nothing to his obligation under the agreement other than setting a time limit on the exercise of his option.

B. Zessos Had The Right — As Opposed To The Obligation — To Open A Blue Collar Franchise.

It is clear from the foregoing examination of the contract documents that a tying arrangement, if it existed at all, had to exist outside the contractual agreement of the parties.

The gravamen of the Fifth Count of the Amended Complaint is that Zessos was required to open a blue collar franchise in order to continue to operate a white collar franchise. (A.14-15, Par. 34) The complaint does not differentiate, however, between a blue collar franchise in Hartford and a blue collar franchise in New Haven. To the extent that the allegation is that there was an illegal tying arrangement as to the Hartford blue collar franchise, such a tying arrangement obviously did not exist because Zessos testified that he never opened a Handy Andy in Hartford. (A.111) In addition, even though Zessos was mistakenly advised by his own counsel that the Handy Andy must be opened within six months from the date of the original agreement (A.83-85), Zessos never indicated that he knew, nor that he was told of any penalty that would be imposed on him as a result of his failure to open the

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[9]*But see* 365 F. Supp. at 896.

Handy Andy. In fact, no penalty was imposed on Zessos for not opening a Hartford Handy Andy because there was none in the franchise agreement.

Since a tie-in is by definition more than a naked request, it must imply some type of pressure or sanction upon the purchaser if he does not purchase the tied product. *A fortiori*, there being no pressure upon, sanction, threats, reprisals or repercussions from Zessos' failure to open a Hartford Handy Andy, there can be no basis for an anti-trust case. Zessos has submitted no evidence to indicate that he ever experienced or perceived any compulsion to open a Hartford Handy Andy at any time during the four years of his contract with Olsten.

Zessos' sole claim of an illegal tie-in is, therefore, reduced to the unsupported allegation that he was required to open a Handy Andy in New Haven in order to obtain a white collar franchise in New Haven. However, an examination of Zessos' own correspondence and deposition testimony clearly and correctly revealed to the District Court that his decision to open a blue collar franchise in New Haven was entirely self-motivated. (365 F.Supp. at 894)

That Zessos' decision to open the New Haven Handy Andy was voluntary has further corroboration. Although Olsten, according to Zessos, "insisted" on August 23, 1969, that Zessos open the Handy Andy by December 31, 1969, the corporation for the New Haven blue collar franchise had, in fact, been incorporated since February of 1969 (A.78, Par. 37) and opened for business, as a result of an earlier decision by Zessos, one month later, in September, 1969. (*Id.*, Par. 38)

In addition to the fact that Zessos was neither pressured nor coerced into opening the blue collar franchise, no sanctions were threatened or could have been imposed upon his failure to do so. There is absolutely no evidence, either documentary or testimonial, that, had Zessos not opened the New Haven Handy Andy by December 31, 1969, he would have lost the right to operate any white collar franchise.

While ignoring the absence of sanctions, Zessos has argued that the mere offering of both the white collar and the blue collar franchises (A.307, Par. 5), even though the blue collar offer was gratuitous (A.355, Par. 4; A.357, Par. 4) constituted an unlawful tie. However, even accepting Zessos' assumptions, there is nothing illegal about such an offer. There can be no illegal tie-in unless pressure or coercion by the seller influences the buyer's choice. *American Manufacturers Mut. Ins. Co.* v. *American B.-P. Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). *See also Belliston* v. *Texaco, Inc.*, 455 F.2d 175, 183-184 (10th Cir. 1972) and *Northern Pac. Ry.* v. *United States*, 356 U.S. 1 (1958) at n.4.

In *American Manufacturers*, the plaintiff-buyer argued that the seller's offer of a package when the buyer wanted only one item was a violation of Section 1 of the Sherman Act. 446 F.2d at 1136. This Court refused to accept this argument and held, in essence, that it is permissible for a seller to negotiate for a package; an illegal tying agreement can be established only if the seller unreasonably continues to negotiate for a package and the buyer, after forthright and diligent bargaining for a line item purchase, accedes to the seller's offer only as a result of pressure or coercion.

This Court went on to hold that:

> Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie. (*Id.* at 1137)

The clear holding of *American Manufacturers*, when viewed with the deposition testimony of Zessos that he was negotiating for both a white collar and a blue collar franchise (A.110), the Supplemental Affidavit of Robert Helweil that Zessos never requested a deletion of the blue collar franchise right (A.357), and the Supplemental Affidavit of William

Olsten that Zessos never requested the white collar franchise without the blue collar franchise (A.355), can only lead to the conclusion that, both as a matter of fact and as a matter of law, Olsten was entitled to summary judgment.

Zessos attempts to use a market foreclosure argument to prove an illegal tying arrangement, but this is to confuse cause and effect. A tying arrangement, in this context, is a cause of a market foreclosure, which is an effect or result.[10] A market foreclosure can result from acts that do not involve a tie-in. Note the restraint of trade combination in *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 365 F.Supp. 1073 (D.N.J. 1973) cited by Zessos (Brief, p. 13), which was not a tie-in case.

Notwithstanding that the foreclosure argument was not specifically pleaded by Zessos (A.14-15, Par. 34), he now asks this Court to construe a best efforts clause and a restrictive covenant clause (A.31, Par. 25-26, respectively) as establishing market foreclosure.

Reduced to its common denominator, Zessos' argument is that because he opened an Olsten blue collar service, he could not, therefore, have opened a competitor's blue collar service and, therefore, was foreclosed from doing business with those competitors, and those competitors were foreclosed from doing business with Zessos.

While this may or may not be true,[11] this does not constitute a tying arrangement. Neither the best efforts nor restrictive covenant clauses constitute a tying of white collar to blue collar services. Assuming, *arguendo*, their invalidity, they "tie" only blue collar to blue collar, and white collar to white collar. But, a "blue to blue" tie and "white to white"

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[10]Indeed, this was Zessos' original position, set forth in his Amended Complaint, which he now reverses. (A.16, Par. 41)

[11]The record is devoid of any evidence that Zessos desired or attempted to open any blue collar business other than a Handy Andy. (365 F. Supp. at 894 n.12)

tie are totally without the scope of the complaint. (A.14, Par. 34)

Neither a best efforts clause nor a restrictive covenant clause, applicable after the termination of a contract, is subsumed by the anti-trust laws. This Zessos recognized by not having referred to either clause in the Fifth Count of the Complaint.

Once Zessos *voluntarily* elected to open the Handy Andy blue collar service,[12] he cannot then retrospectively argue foreclosure. This is necessarily so, since the foreclosure, if any, of other franchisors was caused not by the seller, but by the buyer's own independent business decision to devote his resources to a Handy Andy operation as his entry into the blue collar field.

Nor does Zessos' argument have relevance to the facts at bar. There is not one scintilla of evidence that, had Zessos not voluntarily elected to open an Olsten blue collar agency, he would have voluntarily commenced operation of a non-Olsten blue collar agency. Furthermore, the record is

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[12] The District Court stated:

> I conclude from the evidence presented by both parties in the form of affidavits and depositions that it is beyond factual dispute that the defendant never exerted any economic pressure to compel the plaintiff to operate a blue-collar employment service franchise. I find, to the contrary, that the only dealings between the parties on the subject of Handy Andy came at the behest of the plaintiff, who sought an extension of time in which to begin such operations . . . 365 F.Supp. at 894-95
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> . . . Neither the contract nor the relations between the parties revealed in the documents accompanying their motions suggests that the defendant pressured Zessos to begin the Handy Andy operation. What emerges from the evidence is a picture of a businessman who waited until he thought, mistakenly, that the right time had come for him to venture into a new field. There is nothing before the court to suggest that the defendant ever insisted, or plaintiff ever considered, that the operation of the white-collar franchises was dependant upon his entrance into the blue-collar market. Rather, the conclusion is unavoidable that, throughout the history of his relationship with the defendant, the plaintiff considered the blue-collar business "just another area that we could earn quite a bit of income, an area that the Olsten organization was expanding into". 365 F.Supp. at 895 (footnote omitted)

devoid of any evidence that he was, would have been, or even could have been, by virtue of his white collar operations, or the terms of the franchise agreement, precluded from operating a non-Olsten blue collar service.

Zessos' foreclosure argument, which confuses cause and effect, implies the exertion of economic pressure. But the District Court specifically found that there was no such exertion of economic pressure. 365 F.Supp. at 894-95.

V.

MISUSE OF ECONOMIC POWER IS REQUIRED TO ESTABLISH A CASE OF AN UNLAWFUL TYING ARRANGEMENT.

The proposition that there can be no illegal tie unless the seller influences the buyer's choice by exerting economic pressure is amply supported by case law. *American Manufacturers Mut. Ins. Co.* v. *American B.-P. Theatres, Inc.*, 446 F.2d 1131 (2d Cir. 1971); *Belliston* v. *Texaco, Inc.*, 445 F.2d 175, 184 (10th Cir. 1972); *Abercrombie* v. *Lum's Inc.*, 345 F.Supp. 387, 391 (S.D. Fla. 1972); *Laing* v. *Minnesota Vikings Football Club, Inc.*, 372 F.Supp. 59, 60 (D. Minn. 1973); *New Amsterdam Cheese Corp.* v. *Kraftco Corp.*, 363 F.Supp. 135, 140 (S.D.N.Y. 1973); *Refrigeration Engineering Corp.* v. *Frick Co.*, 370 F.Supp. 702, 709 (W.D. Tex. 1974); *E.B.E., Inc.* v. *Dunkin' Donuts of America, Inc.*, Civil No. 36752, ____ F.Supp. ____ (E.D. Mich., filed July 24, 1974).

Zessos argues that "no such inflexible requirement of 'unlawful coercion' exists; and that the cases relied upon by the District Court are distinguishable from the instant case and do not impose an 'unlawful coercion' requirement on these facts". (Zessos' Brief, p. 19)

Zessos' attack on the District Court's requirement of "unlawful coercion" is essentially a semantic one. Thus the Court in *American Manufacturers* variously stated the principle of misuse of economic power as "pressure", "the

exertion of economic muscle" and "unlawful coercion"; 446 F.2d at 1137; the *Laing* case refers to the same requirement as "the requisite compulsion". 372 F.Supp. at 60; and *Refrigeration Engineering* uses the synonym "forcing". 370 F.Supp. at 709. Olsten respectfully submits that the District Court's use of the term "unlawful coercion"[13] is an apt expression of the fundamental requirement that economic power must be used to effect an illegal tying arrangement.

Zessos also attacks the District Court's adoption of the "unlawful coercion" requirement as an unprecedented extension of the rule of *Fortner Enterprises* v. *U.S. Steel Corp.*, 394 U.S. 495 (1969). (Zessos' Brief, pp. 19-20) Zessos,[14] Olsten and the District Court[15] agree that *Fortner* and like cases relax the traditional market dominance test as a condition precedent to maintaining an illegal tie-in case:

> The standard of "sufficient economic power" does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. 394 U.S. at 502-503.

Where Zessos on the one hand, and the District Court and Olsten on the other, part company is on the question of whether the economic power required by *Fortner* must be *exercised* in order to establish a case of an illegal tie. *Cf.* Zessos' Brief, p. 20 and 365 F.Supp. 892. In *Fortner*, the Supreme Court took no issue with the District Court's

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[13]At various points the District Court also used such analogous phrases as "not constrained", 365 F. Supp. at 893; "coerced" *Id.* at 894; "compelled", *Ibid.*; "exercised economic power", *Ibid.*; and "economic pressure", *Id.* at 895.

[14]Zessos' Brief, p 20.

[15] 365 F.Supp. at 892.

finding that "the agreement involved . . . was essentially a tying arrangement, under which the purchaser was *required* to take a tied product . . . as a condition of being allowed to purchase the tying product . . ." 394 U.S. at 497. (emphasis added) Rather, the Supreme Court addressed itself to, and reversed the lower court on, the test for determining the requisite economic power.

Nowhere does *Fortner* state that the mere *existence* of economic power - by whatever quantification test measured - eliminates the traditional requirement that such power be *used* to effect an illegal tie. *Cf.* 365 F.Supp. at 892.

Indeed, *Fortner* leaves intact the traditional requirement[16] that economic power - by whatever test measured - must be used in order to establish an illegal tie:

> . . . Market power is therefore a source of serious concern for essentially the same reason, regardless of whether the seller has the greatest economic power possible or merely some lesser degree of appreciable economic power. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers - whether few or many, whether scattered throughout the market or part of some group within the market - *can be forced* to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to *force* them to accept a tying arrangement that would prevent free competition

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[16] *Cf. Northern Pac. Ry.* v. *United States*, 356 U.S. 1 (1958):

> Of course where the seller has no control or dominance over the tying product so that it does not represent *an effectual weapon to pressure buyers* into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. 356 U.S. at 6-7. (emphasis added)

and

> *By conditioning* his sale of one commodity on the purchase of another, a seller *coerces* the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. 356 U.S. at 10. (emphasis added)

> for their patronage in the market for the tied product. Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or *impose* other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market. 394 U.S. at 503-504. (emphasis added)

Zessos has been unable to cite any authority for the proposition that the mere quiescent possession of economic power, without its use, is sufficient to make a *prima facie* case of an illegal tie. Olsten respectfully submits that *Fortner*, although, it has affected the standards for measuring economic power, has left untouched the proposition that such power must be used. This is illustrated by a host of decisions, handed down after *Fortner*, which continue to require that economic power be *used* to effect an illegal tie. *American Manufacturers Mut. Ins. Co.* v. *American B.-P. Theatres, supra; Belliston* v. *Texaco, Inc., supra; Abercrombie* v. *Lum's Inc., supra; Laing* v. *Minnesota Vikings Football Club, Inc., supra; New Amsterdam Cheese Corp.* v. *Kraftco, Corp., supra; Refrigeration Engineering Corp.* v. *Frick Co., supra*. Indeed, *American Manufacturers*, 446 F.2d at 1137, *Abercrombie*, 345 F.Supp. 390 n.3, and *Refrigeration Engineering*, 370 F.Supp. at 711, specifically cite *Fortner*, with no indication that the *Fortner* principle contradicts the requirement of unlawful use of economic power.

Moreover, the District Court's analysis of *Fortner* and *American Manufacturers* was cited approvingly in *E.B.E.* v. *Dunkin' Donuts of America, Inc.*, Civil No. 36752, ____ F.Supp. ____ (E.D. Mich. filed July 24, 1974). In that case, the defendant obtained summary judgment dismissing counts of a franchisee's anti-trust complaint charging illegal tying of the purchase of equipment, signs and store premises to the granting of the franchise. The court held that there could be no illegal tying absent proof of coercion.

Zessos' inferred contention is that the mere existence of economic power - without unlawful use - is sufficient. However, such an analysis is senseless, because it severs the connection between economic power and the tying arrangement. The sole reason for the economic power requirement is that such power is used to effect - directly or indirectly - the tie. Obviously without power *and* its use, there could be no inducement for the buyer to purchase the tied product and, therefore, no restraint on trade. *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 6-7, 10 (1958); *Fortner Enterprises* v. *U. S. Steel Corp.*, 394 U.S. 495, 503-504 (1969).

Zessos compounds his erroneous interpretation of *Fortner* by implying that where the tying item is a license of a federally registered trademark, it is not merely economic power which is presumed,[17] but also its misuse. (Zessos' Brief, pp. 23-25) Assuming, *arguendo*, that economic power may be presumed from the existence of a trademark, misuse of that power must still be separately established. *American Manufacturers Mut. Ins. Co.* v. *American B.-P. Theatres*, 446 F.2d at 1137. Indeed, Zessos has not and cannot submit any authority for the contrary proposition

Zessos then argues that coercion cannot be a prerequisite of an illegal tie because "the buyer's motive in taking the tied item is irrelevant to the existence of the tie". (Zessos' Brief, pp. 25-29) Zessos' premise is that coercion depends on the buyer's state of mind, i.e., one cannot be coerced unless

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[17] Zessos misquotes the District Court. Zessos states:

> As the court below recognized, requisite economic power is now presumed from the existence of a trademark or franchise license as well. 365 F.Supp. at 892. (Zessos' Brief, p. 24)

and later:

> The district court recognized that a trademark franchise creates a presumption of economic power in the tying item. 365 F.Supp. at 892. *Ibid.*

What the District Court actually said was:

> . . . the majority in *Susser* refused to hold that the requisite economic power could be presumed from the existence of the trademark. See 332 F.2d. at 519. 365 F.Supp. at 892.

he feels coerced.[18] Zessos then submits that the buyer's motivation in purchasing a tied product is irrelevant in determining whether there is an illegal tie. Zessos' conclusion: the coercion requirement is superfluous.

This "chain" of logic has a non-existent link. Coercion, i.e., the unlawful use of economic power is *not* determined by the buyer's state of mind. The unlawful use of economic power is an objective measure of the seller's pressure on the buyer to purchase the tied product. *Cf. Fortner, supra,* at 503-504. Indeed, were it otherwise, the legality of a tying arrangement would rest on the wholly subjective standard of a buyer's frame of mind, thus ignoring fundamental policy objectives of the anti-trust laws: fostering competition and protection of the consumer. *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 6 (1958); *Anderson* v. *Home Style Stores, Inc.,* 358 F.Supp. 253, 255-256 (E.D. Pa. 1973).

Pages 32 through 38 of Zessos' brief intertwine and confuse the indicia of economic power with the unlawful use of that power. Thus, while it may be true that product attractiveness, superior bargaining power and contractual restrictions may indicate the existence of economic power, it does not follow that the possession of such indicia constitutes the unlawful exercise of that power. Zessos cites cases in which power not only existed but was unlawfully used. Such is not the case here, where the District Court concluded there was no unlawful use of economic power.[19]

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[18] Zessos raises this argument in slightly different form at p. 41 of his Brief. Because coercion requires consideration of the motives and intent of the parties, he argues, and because the determination of motivation is a factual question, trial by jury and not summary judgment is appropriate in determining that question. As submitted here, coercion, i.e., the unlawful use of economic power to effect an illegal tie, is measured objectively. Zessos' argument is semantic, and depends on *Black's Law Dictionary* for a definition of coercion wholly inapposite here. (Zessos' Brief, p. 41)

[19] "The record is utterly devoid of evidence that Zessos was in any way coerced or compelled to open a Handy Andy office. To state the crucial point another way, there is no indication whatever that Zessos attempted to free himself from the supposed burden of having to open a Handy Andy office, or that he bargained with

Zessos attempts to distinguish the authority cited by the District Court for the proposition that:

> . . . economic power must not simply exist; it must be used. '[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice.' *Amer. Mfrs. Mut. Ins. Co.* v. *Amer. B-P Theatres*, 446 F.2d 1131, 1137 (2d Cir. 1971), cert. denied, 404 U.S. 1063, 92 S.Ct. 737, 30 L.Ed.2d 752, (1972). See also, *Belliston* v. *Texaco, Inc.*, 455 F.2d 175, 183-184 (10th Cir. 1972), cert. denied, 408 U.S. 928, 92 S.Ct. 2494, 33 L.Ed.2d 341 (1972); *Abercrombie* v. *Lum's Inc.*, 345 F.Supp. 387, 391 (S.D. Fla. 1972). 365 F.Supp. at 892.

Zessos argues that this Court's decision in *American Manufacturers* is inapposite, first, because there the parties engaged in a long series of negotiations during which the defendant made substantial concessions, while, in the instant case, Zessos was offered the white and blue collar franchises on a "take it or leave it" basis, an allegation which is not supported by the record. (Zessos' Brief, p. 20) It is true that "Olsten offered and Zessos happily accepted" the Handy Andy Franchise (A.355, Par. 4), but, if anything, this fact indicates a lack of coercion. Olsten can hardly be faulted

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Olsten for a white-collar franchise alone." 356 F.Supp. at 894.

"I conclude from the evidence presented by both parties in the form of affidavits and depositions that it is beyond factual dispute that the defendant never exerted any economic pressure to compel the plaintiff to operate a blue-collar employment service franchise. I find, to the contrary, that the only dealings between the parties on the subject of Handy Andy came at the behest of the plaintiff, who sought an extension of time in which to begin such operations." *Id.* at 894-95.

"I find, therefore, that the white-collar and blue-collar franchises were entirely separate operations; that the plaintiff was never compelled to operate the latter in order to obtain the former; that he received the right to use the Handy Andy trademark along with his purchase of the Olsten franchise without payment of additional consideration." *Id.* at 895-96.

"Construing as a matter of law the plain language of the contract . . . I hold that Zessos was in no way obligated to enter the blue-collar industry and that his only obligation under the contract was to fulfill its conditions with respect to the Olsten white-collar franchise." *Id.* at 896.

for Zessos' decision not to belabor the negotiations over the license agreement for more than six to eight sessions. The anti-trust laws do not require jousting with windmills. *American Manufacturers, supra,* at 1137.

Second, Zessos argues that there was no contract term or foreclosure element in *American Manufacturers* similar to the contractual requirement here that Zessos "refrain from offering temporary blue collar employment services other than through the Olsten owned Handy Andy franchise".[20] (Zessos' Brief, pp. 20-21) The franchise agreement does not support Zessos' claim as so stated. Also, this Court made specific note of the foreclosure aspect in *American Manufacturers,* stating:

> "Foreclosure implies *actual exertion of economic muscle,* not a mere statement of bargaining terms which, if they should be enforced by market power, would then incorporate an illegal tie." 446 F.2d at 1137. (emphasis added)

The Court below has concluded that no economic muscle was exerted in the case at bar, thus precluding a finding of market foreclosure.[21]

Third, Zessos urges that *American Manufacturers* is dissimilar from this case because "the tying aspect here is emphasized by the requirement that . . . fees on the tied item had to be paid Olsten under the contract based on a percentage of Handy-Andy gross billings".[22] (Zessos' Brief, p. 21) This point was readily dispatched by the Court below:

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[20] Zessos is thus conveniently reversing the allegations contained in paragraph 41 of his Amended Complaint that "competitors (of Olsten) were denied full access to the market for the sale and establishment of blue collar franchises . . ." (A.16)

[21] See 365 F.Supp. at 896n.12.

[22] Zessos is referring here to the franchise fee as distinguished from the original license fee. There is no question about Zessos' obligation to pay the franchise fee based on gross billings. As to the original license fee, Zessos himself has indicated that none was due on the Handy Andy license. 365 F.Supp. at 894n.12.

> "Plaintiff argues that the defendant had a financial interest in his entrance into the blue-collar field, because its franchise fees were based upon plaintiff's gross billings. Thus defendant stood to make money even from operations such as the New Haven Handy Andy which incurred net operating losses. This simple truism does nothing to establish the existence of a tying arrangement. If it did, nearly all franchise agreements would be held to violate the antitrust laws." 365 F.Supp. at 893. n.10

Finally, Zessos argues that *American Manufacturers* is inapposite because here, unlike there, the District Court scrutinized the conduct of the parties *after* the license agreement had been negotiated and concluded that there had been no coercion. (Zessos' Brief, pp. 21-22) Zessos' argument, then, is that the coercive nature of a contract must be determined by its terms rather than by its application. But that precise determination has been made by the District Court in its holding that the license agreement was non-coercive. 365 F.Supp. at 896. Moreover, the conduct of the parties, *dehors* the agreement, hardly indicates coercion. 365 F.Supp. at 894 n.12. Zessos continued to operate under the Olsten agreement for four years with no indication that he was "coerced". The conduct of the parties after the license agreement was executed was examined primarily in relation to Zessos' claim that the August, 1969, agreement, and the negotiations leading up to it, in effect created, or exposed, a tie-in not previously recognized by Zessos.

Zessos attacks the applicability of *Abercrombie* and *Belliston* by arguing that those cases stand for the proposition that coercion may be shown either by the coercive terms of a contract itself or by coercion extrinsic to the contract. (Zessos' Brief, pp. 22-23) But Zessos' analysis nowhere challenges the fundamental principle of *Abercrombie* and *Belliston* that "[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice". *Aber-*

crombie, 345 F.Supp. at 391; *Belliston*, 455 F.2d. at 184. In any event, the District Court here concluded that there was no coercion, either intrinsic or extrinsic to, the license agreement. 365 F.Supp. at 896.

VI.

THE DISTRICT COURT DID NOT ERR IN GRANTING OLSTEN'S MOTION FOR SUMMARY JUDGMENT.

Zessos argues that Summary Judgment was improperly granted by the District Court because a fair reading of paragraph 2 of the franchise contract raises a question of fact. (Zessos' Brief, pp. 38-39) This argument, of course, exceeds the permissible bounds of an appeal under 28 U.S.C. § 1292(b) which limits such an appeal to "a controlling question of law". Zessos suggests that, because other inferences *could have been drawn* from the evidence, the District Court's judgment, based on its interpretation of that evidence, should be supplanted. This argument is merely a restatement of Zessos' disagreement with the District Court's conclusion that there is no genuine issue as to any material fact. It is a well-recognized principle, that ". . . [V]ague and conclusory allegations [are not] sufficient to forestall the award of summary judgment". *Dressler* v. *MV Sandpiper*, 331 F.2d 130, 133 (2d Cir. 1964); *Hoffman* v. *Herdman's Ltd.*, 41 F.R.D. 275, 278 (S.D.N.Y. 1966).

Zessos takes the position that the District Court improperly held that the plain language of the franchise contract did not obligate Zessos to enter the blue collar industry. (Zessos' Brief, pp. 39-40) Zessos argues that the District Court resorted to "extrinsic circumstances" in interpreting paragraph 2 of the franchise agreement. This belies the clear language of the District Court's

opinion.[23] But even assuming, *arguendo*, that the District Court did rely on extrinsic evidence as to construction of the contract, where an examination of extrinsic evidence reveals no disagreement of fact between the parties in their interpretation of the plain meaning of the contract, summary judgment is clearly appropriate. *See Green* v. *Valve Corp. of Amer.*, 428 F.2d 342, 344 (7th Cir. 1970). Nothing in the District Court's opinion suggests any such disagreement between the parties. The District Court's construction of unambiguous contract language is a question of law.

Zessos also argues that use of the word "shall" in paragraph 2 of the franchise contract is ambiguous, thus raising a question of fact which should not have been resolved by summary judgment.[24] But the clear and controlling concept of paragraph 2, as determined by the District Court, is that Zessos had the *right* rather than the obligation to open a blue collar franchise.[25] Where a reasonable man reading the clear language of a contract could reach but one interpretation, the Court may construe the contract as a matter of law. *See, Lewron Television, Inc.* v. *D. H. Overmeyer Leasing Co.*, 43 F.R.D. 5 (D. Md. 1967). The second sentence of paragraph 2, and what follows, clearly applies to and governs the manner of conducting a Handy Andy operation if the right to do so is exercised by Zessos.

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[23] The District Court stated:

"The key provision of the contract, Paragraph 2, . . . simply granted the plaintiff the right to use the Handy Andy trademark." 365 F.Supp. at 895.

[24] Paragraph 2 of the franchise agreement provides, in relevant part:

"The grant of the license hereunder includes the right of the LICENSEE to use the trademark and name HANDY ANDY LABOR. All "blue collar" personnel shall be supplied by a division of the LICENSEE designated as HANDY ANDY LABOR commencing six (6) months from the date hereof." (A.20)

[25] 365 F.Supp. at 895.

CONCLUSION

The Court below has found that Olsten in no way compelled Zessos to enter the blue collar field as a condition of obtaining a white collar franchise. Indeed, Zessos' option of entering the blue collar field was extended as a right, rather than an obligation, with no threat of sanction or penalty for the non-exercise of that right. Olsten respectfully submits that the facts, as found to be beyond dispute by the District Court, do not disclose an illegal tying arrangement, and that the District Court's judgment should accordingy be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CAPITAL TEMPORARIES, INC. OF HARTFORD, CAPITAL TEMPORARIES, INC. OF NEW HAVEN AND CONSTANTINE T. ZESSOS,	:	NO. 74-1077
Appellants and Plaintiffs below	:	CERTIFICATION OF SERVICE
- against -	:	(United States District Court for the District of Connecticut
THE OLSTEN CORPORATION,	:	Civil Action No. 14,749)
Appellee and Defendant below	:	August 16, 1974

I, RICHARD W. TOMC, do hereby certify that two copies of the Appellee's Brief were served upon counsel of record for the Appellants-Plaintiffs by hand delivering the same to said counsel at their addresses of record as shown below:

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